FILED

No. 02 452 SEP 11 2002

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IN THE

Supreme Court of the United States

MARTIN GOLD, as Trustee of the Martin Gold, Attorney at Law, P.C. Defined Benefit Pension Plan dated 12-10-87, individually and on behalf of others similarly situated,

Petitioner,

—v.—

SQUADRON, ELLENOFF, PLESENT, & LEHRER, SQUADRON, ELLENOFF, PLESENT & SHEINFELD, LLP and IRA L. SORKIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT APPELLATE DIVISION—FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a state law claim pending in federal court as a claim pendent to a federal statutory claim is dismissed without prejudice because the federal court declines to exercise supplemental jurisdiction after the federal statutory claim is dismissed, does 28 U.S.C. § 1367(d) toll the state statute of limitation during the pendency of the state law claim in federal court?

2. Does the Supremacy Clause, U.S. Constitution, Article VI, Cl. 2, require state courts to apply the tolling provisions of 28 U.S.C. § 1367(d) to state-law claims during their pendency in federal court?

LIST OF PARTIES

The caption contains the names of all the parties. No corporate listing is required under Rule 29.6 because petitioner is a natural person.

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Martin Gold petitions for a writ of certiorari to review the New York state court judgment holding that, notwithstanding the federal tolling provision in 28 U.S.C. § 1367(d), "state law controls" (A8) the tolling of statutes of limitations for state-law claims pending in federal court. This Court should grant the writ because only this federal court can require state courts to enforce 28 U.S.C. § 1367(d) given that this tolling provision is applied only to actions filed in a state court after dismissal of state-law claims from an earlier federal action.

CITATION TO OPINION BELOW

Petitioner seeks review of an order of the New York Appellate Division, First Department that is reported at 286 A.D.2d, 57, 732 N.Y.S.2d 565 (1st Dep't 2001) and is set out in the Appendix (A1). That order adopts and affirms an opinion and order of the Supreme Court, State of New York, New York County, which is unreported and set out in the Appendix (A3).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) because the petitioner seeks review from a state court decision denying him a right claimed under a statute of the United States – the right to the tolling of state statutes of limitations pursuant to 28 U.S.C. § 1367(d) during the time his state-law claims were pending in federal court. The date of the order to be reviewed is November 13, 2001, the date on which the New York Supreme Court Appellate Division, First Department affirmed a lower court order dismissing the complaint on statutes of limitations grounds. Petitioner thereafter exhausted his right to review by the state court of

last resort, the New York Court of Appeals, by filing a notice of appeal and by motion for leave to appeal. The New York Court of Appeals dismissed the notice of appeal in an order reported at 97 N.Y.2d 725, 767 N.E.2d 153 (N.Y. 2002) and set out in the Appendix (A12). The New York Appellate Division, First Department denied leave to appeal to the Court of Appeals in an unreported order set out in the Appendix (A10). The New York Court of Appeals denied leave to appeal in an order reported at 98 N.Y.2d 606, __ N.E.2d __ (N.Y. June 13, 2002) and set out in the Appendix (A14). The petition to this Court for a writ of certiorari is timely under Rule 13.1 because it is filed within 90 days after the New York Court of Appeals denied discretionary review.

CONSTITUTIONAL CLAUSE AND STATUTE INVOLVED

U.S. Const., Art. VI, Cl. 2:

[T]he Laws of the United States . . . shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. § 1367:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States

Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

* * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of thirty days after it is dismissed unless state law provides for a longer tolling period.

* * *

STATEMENT OF THE CASE

This case concerns the application of the federal supplemental jurisdiction statute – and, specifically, its tolling provision – to state-law claims dismissed without prejudice after the district court dismisses claims over which it had

original jurisdiction (A4). The statute, 28 U.S.C. § 1367, authorizes federal district courts to exercise jurisdiction over pendent state-law claims – i.e., claims that would not, standing alone, come within a district court's original jurisdiction, but that "are so related to" claims within the court's original jurisdiction "that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The same statute tolls the limitations period for such claims while they are pending in federal court and for 30 days after they are dismissed. 28 U.S.C. § 1367(d).

The federal complaint that preceded the state court action that is the subject of this petition was filed against respondents on June 7, 1993 in the Southern District of New York (A6). It alleged that respondents aided and abetted others to defraud a class of investors in a Ponzi scheme that caused hundreds of millions of dollars in damages in violation of the anti-fraud provisions of federal securities law, i.e., Rule 10b-5 and § 10(b) of the Securities Act of 1934, 15 U.S.C. § 78j(b), as well as state law. The district court had original jurisdiction over the federal claim under 28 U.S.C. § 1331 and supplemental jurisdiction over state-law claims under 28 U.S.C. § 1367(a). Section 1367(a) states, in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

At the time the federal action was brought in 1993, aiding and abetting was an established basis for § 10(b) liability based upon opinions rendered by the courts of appeal. In 1994, however, this Court held that § 10(b) did not create aiding and abetting liability. *Central Bank v. First Interstate Bank,* 511 U.. 1164 (1994). In response to that decision petitioner filed amended complaints alleging that respondents violated § 10(b) directly and not simply as aiders and abettors. In a series of decisions thereafter issued by a magistrate judge, the district court and the Court of Appeals, these courts considered the scope of a § 10(b) violation in light of the *Central Bank* decision. The district court held that although aiding and abetting liability was no longer a viable basis for liability, petitioner nonetheless could plead a federal claim of conspiracy to violate Rule 10b-5 and § 10(b). *In re Towers Financial Noteholders Litigation,* 936 F. Supp. 126, 129 (S.D.N.Y. 1991) ("If plaintiffs can put these allegations [of conspiracy] – which were so eloquently described by their counsel at oral argument – into a formal pleading, such a pleading would constitute a valid allegation that Sorkin had knowingly and wilfully engaged in a deliberate conspiracy unlawfully to obtain funds by the deception of investors, in violation of Rule 10b-5.") The Second Circuit disagreed and reversed, holding that the federal anti-fraud statute simply did not cover conspiracy based upon its analysis of the *Central Bank* decision. *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin,* 135 F.3d 837 (2d Cir. 1998). The debate over how to apply the *Central Bank* decision, however, consumed many years.

A final judgment dismissing the federal claim with prejudice and the state-law claims without prejudice was entered on November 18, 1998 (A6). The state-law claims were dismissed for the reason stated in the supplemental

jurisdiction statute (A7), 28 U.S.C. § 1367(c)(3), namely, "the district court has dismissed all claims over which it has original jurisdiction" under 28 U.S.C. § 1331. Although an appeal to the Second Circuit was noticed, it was withdrawn by stipulation of the parties on March 9, 1999 (A6). Before the appeal was withdrawn, petitioner filed his case in New York state court in February 1999, pursuing the state-law claims dismissed without prejudice in federal court (A6).

Section 1367(d), by its terms, provides that the state limitations period "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed" and should have been so applied by the state court. *Raygor v. Regents of the University of Minnesota,* 534 U.S. 533, __, 122 S. Ct. 999, 1005 (2002) ("If subsection (d) applied in such circumstances, it would toll the state statutes of limitations for 30 days in addition to however long the claim had been pending in federal court.").

Petitioner raised this very point, and the federal question sought to be reviewed here, in the state trial court as soon as respondents moved to dismiss the complaint on statute of limitations grounds (A8). The state-law statute of limitations applicable to the state-law claims is six years (A5) and petitioner pointed out that 28 U.S.C. § 1367(d) tolled that six-year period during the pendency of the state-law claims in federal court.

The arithmetic calculation that the state-law claims were timely filed in state court if 28 U.S.C. § 1367(d) tolled the statutes of limitations is not in dispute. The last incident of fraud that petitioner alleges occurred on December 26, 1992 (A5). The state-law claims were pleaded against respondents as part of the federal action on June 7, 1993 (A6). The federal action tolled the state-law limitations period by operation of 28 U.S.C. § 1367(d) until thirty days after final judgment was

entered on November 16, 1998 (A6) – that is, until December 16, 1998. The state court action commenced on February 5, 1999 (A7). Accordingly, five months and eleven days of the six-year state limitations period ran between December 26, 1992 and June 7, 1993. An additional 51 days ran between December 16, 1998 and February 5, 1999. This means a total of only seven months ran on the six-year state limitations period.

Under New York state law, statutes of limitations are not suspended during the pendency of an action. Rather than apply 28 U.S.C. § 1367, the state court applied state law to the question of whether statutes of limitations are tolled during the pendency of state-law claims in federal court, held that petitioner's action was untimely, and dismissed it for that reason. As a result, the state court never afforded petitioner the benefit of federal tolling.

Congress enacted the supplemental jurisdiction statute as part of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, to codify the common-law doctrines of pendent and ancillary jurisdiction. See H.R. Rep. No. 734 (House Report), 101st Cong., 2d Sess. 27-29 (1990); *City of Chicago v. International Coll. of Surgeons*, 522 U.S. 156, 165 (1997). In *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), the Court held that district courts, when adjudicating federal-law claims within their subject-matter jurisdiction under 28 U.S.C. § 1331, also may adjudicate state-law claims over which they would not otherwise have jurisdiction, if the federal-law and state-law claims "derive from a common nucleus of operative fact" and thus comprise "but one constitutional 'case' " under Article III. 383 U.S. at 725.

In a series of decisions after *Gibbs*, the Court identified various limits on a district court's ability to adjudicate claims

that, although not independently within its subject-matter jurisdiction, are related to claims within its jurisdiction. See, e.g., *Aldinger v. Howard*, 427 U.S. 1 (1976); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978). In *Finley v. United States*, 490 U.S. 545 (1989), the Court held that a district court could not, in the absence of Congressional authorization, exercise jurisdiction over pendent parties, i.e., parties that are not the subject of any claim independently within the district court's jurisdiction. Congress responded by enacting 28 U.S.C. § 1367, which codified the doctrine of pendent jurisdiction that was recognized in *Gibbs* and provided the Congressional authorization that the Court found lacking in *Finley* by expressly permitting pendent party jurisdiction. See Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. New Eng. L. Rev. 1 (1992).

REASON FOR GRANTING THE WRIT

The writ should be granted because the state courts refused to apply the tolling provision of 28 U.S.C. § 1367(d) in derogation of the state courts' duty under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2 to enforce federal law. Because the tolling provision of 28 U.S.C. § 1367(d) applies only to actions filed in a state court after dismissal of state-law claims from an earlier federal action, only this federal court can require state courts to enforce that statute.

Equally important, tolling the state limitations period protects federal court jurisdiction. Given 28 U.S.C. § 1367(d), litigants should not need to divide a case and file parallel state court actions because of statutes of limitations concerns. Further, § 1367(d) allows district courts to assess whether to retain jurisdiction over state-law claims free from concerns

about whether the claims, if dismissed, could be timely filed in state court. Only this federal court can enforce federal tolling in order to eliminate the incentive for district courts to retain jurisdiction over state-law claims that, for reasons of comity or otherwise, are better suited for adjudication in state court. See John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 945 (1998) ("Congress clearly intended subsection 1367(d) to facilitate discretionary dismissal under subsection 1367(c) by relieving courts of concerns about the inequitable consequences of state limitations law barring the dismissed claim from refiling.").

The failure of the New York state courts to enforce the federal statute is obvious – the federal statute says that the statutes of limitations applicable to state-law claims are to be tolled, but the state courts did not give petitioner the benefit of that toll, notwithstanding the Supremacy Clause, which required them to do so.

CONCLUSION

For the reasons stated above, petitioner asks the Court to grant his petition and issue a writ of certiorari to the New York Supreme Court, Appellate Division, First Department.

Dated: September 11, 2002
New York, New York

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At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 13, 2001.

Present – Hon. Peter Tom, Justice Presiding
Israel Rubin
John T. Buckley
George D. Marlow, Justices.

5249

MARTIN GOLD, etc.,

Plaintiff-Appellant,

—against—

SQUADRON, ELLENOFF, PLESENT & LEHRER, et al.,

Defendants-Respondents.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Louis York, J.), entered January 6, 2001,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed for the reasons stated by York, J., with costs and disbursements.

ENTER:

CATHERINE O'HAGAN WOLFE
Clerk.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

Index No. 102276/99

MARTIN GOLD, as Trustee of the Martin Gold, Attorney at Law, P.C. Defined Benefit Pension Plan dated 12-10-87, individually and on behalf of a class of persons similarly situated,

Plaintiff,

—against—

SQUADRON, ELLENOFF, PLESENT & LEHRER, SQUADRON, ELLENOFF, PLESENT & SHEINFELD, LLP and IRA L. SORKIN,

Defendant.

LOUIS YORK, J.:

Defendants move pursuant to CPLR 3211(a)(5) and (7) to dismiss the compliant.

Plaintiff brought this action individually and on behalf of other New York residents who own unsatisfied promissory notes issued by Towers Financial Corporation ("Towers"), a glorified Ponzi scheme which fell apart when an investigation by the Securities and Exchange Commission ("SEC") exposed the fraudulent nature of Towers' operations. Defendants are the attorneys who represented Towers from 1988 until its demise in bankruptcy. The gravamen of plaintiff's complaint is

that defendants knowingly aided and abetted Towers in its systematic defrauding of investors.

Plaintiff had asserted these and other claims against defendants in a federal action which also involved other parties (*In re Towers Financial Corporation Noteholders Litigation*, No. 93 Civ 0810, see complaint at movants' exhibit 2, "the federal action"). In 1995, the federal magistrate presiding recommended that the district court dismiss the federal claims against defendants for failure to state a cause of action, but declined to exercise its pendent jurisdiction over the common-law state claims now at issue (1995 WL 571888, movants' exhibit 4). The district court adopted the magistrate's recommendations but granted plaintiff leave to replead one of the federal law claims (*In re Towers*, 936 F Supp 126 [SDNY 1996]). The repleaded claims were subsequently dismissed on remand after appeal (*Dinsmore* v. *Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, n.o.r., 1998 WL 93337 [SDNY 1998]), and a final judgement dismissing all claims against defendants was entered in November 1998 (movants' exhibit 6). In March 1999, a month after this action was commenced, the appeal of the district court's decision was withdrawn with prejudice by so-ordered stipulation (movants' exhibit 7).

Defendants now seek dismissal of the complaint herein on the grounds that it is: (i) time-barred, (ii) barred by the doctrine of collateral estoppel, and (iii) facially insufficient to state of cause of action. At the outset, the court notes that although this action was purportedly brought as a class action, plaintiff has not made any attempts to certify the class. Hence, for purposes of this motion, the court will only consider the claims alleged in the complaint as they relate to plaintiff individually.

The timeliness of the claims is the threshold issue. It is undisputed that all of the claims at issue were timely asserted in the consolidated federal action. Defendants contend that all of plaintiff's claims against them are time-barred under the applicable statutes of limitations, and plaintiff cannot rely an CPLR 205(a) to toll the clock during the pendency of the federal action. Plaintiff contends that the fraud claims. subject to a limitations period of six years, from time of discovery (CPLR 213[8]), were timely asserted in this action; that CPLR 205(a) applies; and that at any rate there are two other applicable tolling provisions.

Ab initio, the court finds no merit in plaintiff's contention that his fraud-based claims are timely. Plaintiff's construction of the statute of limitations applicable to his fraud-based claims is incorrect. CPLR 213(8) cannot be read in a vacuum to yield six years from when the fraud was discovered. Rather, it must be read in conjunction with CPLR 203(g), which results in the well established rule that a fraud claim must be asserted either within six years of its accrual (i.e., when defendant committed the wrongful act) or within two years of when plaintiff discovered or should have discovered the alleged fraud (*Hammond* v. *Reichbach*, 232 AD2d 254 [1st Dept 1996]; *Ghandour* v. *Shearson Lehman Brothers Inc.*, 213 AD2d 304 [1st Dept 1995]; *Pearl-Wick Corporation* v. *Chase Manhattan Bank, N.A.*, 125 AD2d 249, 252 [1st Dept 1986], affd 71 NY2d 823 (1991). The discovery date computation is meant to aid those plaintiffs who do not become aware of the fraud until after the six-year statute of limitations his expired. Such was not the case here.

According to plaintiff's complaint, the last alleged incident of fraud occurred on December 26, 1992, when plaintiff made his last investment in Towers (complaint,

¶7). Since this action was not commenced until February 1999, more than six years later, it is untimely under CPLR 213(8). Similarly, the complaint alleges that "the earliest that plaintiff . . . could have known about the scheme . . . alleged herein was February 8, 1993, the day after the SEC filed a civil suit . . . [and t]he earliest that plaintiff . . . could have known about [defendants'] conduct was . . . on June 7, 1993." when defendants were named as defendants in the federal action (complaint, ¶49). Using June 7, 1993 as the date of discovery does not serve to extend the statutory limitations period until February 1999. Based on the foregoing, the court finds that all of plaintiff's claims are time-barred unless he can establish that the statute of limitations was tolled.

With respect to the availability of a toll pursuant to CPLR 205(a), defendants argue that plaintiff cannot rely on the statute regardless of when the federal case is deemed to have terminated. If the case was concluded by the appeal's withdrawal in March 1999, the termination was voluntary thus voluntary CPLR 205(a) inapplicable. If the case was terminated when final judgment dismissing the complaint was entered on November 18, 1998, CPLR 205(a) is unavailable as a toll because plaintiff, who did not serve the summons on defendants until May 27, 1999, failed to comply with the statutory requirement of effecting such service within six months. Plaintiff counters that the federal case was not terminated until March 9, 1999, when the appeal was withdrawn, but such withdrawal should not be deemed a proscribed voluntary discontinuance because the stipulation withdrawing the appeal was "so ordered" by the federal court. Additionally, plaintiff argued that the key commencement date for the instant action is February 5,

1999, when the summons was filed, rather than when it was served on defendants.

CPLR 205(a) provides in pertinent part that "[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance . . . plaintiff . . . may commence a new action upon the same transaction or occurrence . . . within six months after the termination provided that . . . service upon defendant is effected within such six-month period." The key to the termination of a federal case lies in the trial court's decision and whether dismissal of the state claims is with or without prejudice (*Dwyer* v. *Cahan*, 150 AD2d 172, 173 [1st Dept 1989]). Under New York law, such a decision does not become meaningful until it has been reduced to a judgment (see CPLR 5011). Here, the district court explicitly dismissed the state law claims without prejudice, after declining to exercise pendent jurisdiction over them. Plaintiff's argument that the federal case was not terminated until the appeal was withdrawn is nothing more than a red herring, The appeal had nothing whatsoever to do with the state law claims, which were dismissed by the district court without protest or appeal by plaintiff.

Based an the foregoing, this court finds that for purposes of CPLR 205(a) the federal court action, in which plaintiff herein asserted similar state law claims against defendants herein based upon the same facts as are now at issue, was involuntarily terminated on November 18, 1998, upon docketing of the final judgment dismissing those claims without prejudice. Hence, to avail himself of the tolling provisions of CPLR 205(a) plaintiff had to commence this action and effect service on defendants within six months of November 18, 1998. Although this action was commenced (i.e., filed; see CPLR 304) during that period, service on defendants was not effected

until May 27, 1999 at the earliest (see affidavits at movants' exhibit 8). Since service was not made within the statutorily prescribed period, the court finds that plaintiff cannot rely on CPLR 205(a) to toll the statutes of limitations for the pendency of the federal action (*Pyne* v. *20 E. 35 Owners Corp.*, 267 AD2d 168 [1st Dept 1999]).

The second tolling provision relied upon by plaintiff is 28 USC § 1367(d). Since contrary to CPLR 205(a), which exempts voluntarily dismissed claims from tollability, this statute favors voluntary dismissals, plaintiff takes the opposite view of the facts he posited in connection with his CPLR 205(a) arguments. Now, plaintiff contends that the state claims asserted in the federal action were voluntarily dismissed on March 9, 1999, when the withdrawal of the appeal was filed, and thus the applicable statutes of limitations were tolled during the pendency of the federal action plus 30 days by 28 USC § 1367(d).

Section 1367(d) provides that the limitations period for a claim over which the federal court has pendent jurisdiction "and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the [first mentioned] claim . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." Clearly, CPLR 205(a), which stops the limitations clock for the period of pendency plus six months rather than 30 days, provides a longer tolling period. Thus, state law controls and plaintiff must comply with the provisions of CPLR 205(a) to get the benefit of the toll under the federal statute as well. Finally, even under the version of the facts now advocated by plaintiff the federal toll would be unavailable because dismissal of the state law claims was not vol-

untary. "[D]ismissal of an appeal pursuant to a stipulation of discontinuance of said appeal does not constitute a voluntary discontinuance" (*Denehy* v. *St. John's Queens Hospital*, 114 AD2d 991, 992 [2d Dept 1985]).

Plaintiff's third alleged basis for a toll is the equitable tolling rule applicable to class actions (*American Pipe and Construction* v. *Utah*, 414 US 538 [1973], rehearing den 415 US 952 [1974]). That "rule" too is unavailing. Simply put, in *American Pipe*, the court held it was equitable and consistent with the relevant statutory scheme to toll the claim of individual putative class members upon commencement of a class action so that individuals who sought to intervene would not be penalized if class certification was denied. Since plaintiff's untimeliness problems stem from his own unexplained delay in serving defendants rather than from any denial of class certification, this equitable doctrine is clearly inapplicable (see *Singer* v. *Ell Lilly and Company*, 153 AD2d 210, 217 [1st Dept 1990]).

Since as discussed above all of plaintiff's claims are time-barred, the court will not address the merits of plaintiff's claims or defendants' remaining arguments for dismissal.

Accordingly, defendants' motion is granted to the extent that it seeks to dismiss plaintiff's complaint as time-barred and is otherwise denied as moot. The Clerk is hereby directed to enter judgment dismissing the complaint.

This decision constitutes the order of the court.

DATED: December 20, 2000

LOUIS B. YORK
J.S.C.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of June 2002

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 343

MARTIN GOLD, &C.,

Appellant,

—v.—

SQUADRON, ELLENOFF,
PLESENT & LEHRER, ET AL.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been

submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars cost and necessary reproduction disbursements.

STUART M. COHEN
Stuart M. Cohen
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of February 2002

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 87 SSD 3

MARTIN GOLD, &C.,

Appellant,

—v.—

SQUADRON, ELLENOFF,
PLESENT & LEHRER, ET AL.,

Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

STUART M. COHEN

Stuart M. Cohen
Clerk of the Court

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on February 7, 2002.

Present: Hon. Peter Tom, Justice Presiding,
Israel Rubin
John T. Buckley
George D. Marlow, Justices.

M-7098
Index #102276/99

MARTIN GOLD, ETC.,

Plaintiff-Appellant,

—v.—

SQUADRON, ELLENOFF,
PLESENT & LEHRER, ET AL.,

Defendants-Respondents.

Plaintiff-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on November 13, 2001 (Appeal No. 5429),

NOW, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon, it is

ORDERED, that the motion is denied, with $100 costs.

ENTER:

CATHERINE O'HAGAN WOLFE
Clerk

Supreme Court, U.S.
FILED
OCT 21 2002
OFFICE OF THE CLERK

No. 02-452

IN THE

Supreme Court of the United States

MARTIN GOLD, as Trustee of the
Martin Gold, Attorney at Law, P.C.
Defined Benefit Pension Plan dated 12-10-87,
individually and on behalf of others similarly situated,

Petitioner,

v.

SQUADRON, ELLENOFF, PLESENT & LEHRER,
SQUADRON, ELLENOFF, PLESENT & SHEINFELD, LLP
and IRA L. SORKIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The caption of the case lists the names of all parties. As respondents are two law firm partnerships (no longer in operation) and an individual, no corporate disclosure statement is required.

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N.Y.C.P.L.R. § 205(a) (McKinney 1992 Supp.) .. *passim*

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David D. Siegel, *Commentary: The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction*, 28 U.S.C.A. § 1367 (West 1993) 4-5

David D. Siegel, *New York Practice* § 614 (3d ed. 1999) 4

Robert L. Stern et al., *Supreme Court Practice* § 3.16 (8th ed. 2002) 8

Respondents (collectively referred to here as "Squadron Ellenoff") respectfully submit this brief in opposition to Martin Gold's petition for a writ of certiorari. The New York Court of Appeals correctly determined that the decision of the trial court, as unanimously affirmed by the Appellate Division, raises no constitutional issue nor any other issue meriting review. The decision was based entirely upon a New York statute governing the time for filing and effecting service of an action in state court following the dismissal of a prior suit. That statute is in no way inconsistent with federal law or the U.S. Constitution. In violation of Rule 14(1)(f), Gold does not even mention the New York statute, and his inexplicable failure to comply with its service requirement — rather than any refusal to apply federal law — was what prompted dismissal of his case.

THE DISPOSITIVE STATUTE OMITTED FROM THE PETITION

New York Civil Practice Law and Rules ("CPLR") 205 (McKinney 1992 Supp.):

> **Termination of action.**
>
> (a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence

or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of the commencement of the prior action and that service upon defendant is effected within such six-month period.

COUNTERSTATEMENT OF THE CASE

While the petition accurately recites the history of the initial federal class action brought against Squadron Ellenoff and others resulting from the collapse of Towers Financial Corporation ("Towers"), it omits several pertinent facts about the subsequent state court action whose dismissal is now sought to be reviewed.

Gold himself filed the first Towers-related class action in federal court barely a week after the Securities and Exchange Commission commenced the enforcement proceeding that led to Towers' downfall in February 1993. He continued as a lead class plaintiff after his complaint was consolidated with several others in a multidistrict litigation in the Southern District of New York. More than five and one-half years later, on November 16, 1998, all claims against Squadron Ellenoff were finally dismissed. (A6).

On February 5, 1999, Gold alone commenced the action now at issue by filing a summons with notice in New York State Supreme Court.[1] But Gold did not *serve* Squadron Ellenoff with the summons until May 27, 1999 — more than six months after the federal action had been dismissed, and more than six years after the conduct alleged in the complaint

1. No complaint was actually filed until Squadron Ellenoff made a demand for a complaint pursuant to CPLR § 3012(b).

had last occurred. Gold does not dispute that, absent some form of tolling, his state court action was manifestly untimely.[2]

Squadron Ellenoff moved to dismiss the action on three separate grounds: untimeliness, collateral estoppel based on the dispositive holdings in the prior federal suit, and failure to state a claim. Because the action was deemed time-barred, the trial court found it unnecessary to reach "the merits of plaintiff's claims or defendants' remaining arguments for dismissal." (A9).

Gold asserts that he raised "the federal question sought to be reviewed here [] in the state trial court as soon as respondents moved to dismiss the complaint on statute of limitations grounds." (Pet. at 6). That is not correct. While Gold did try to invoke 28 U.S.C. § 1367(d) (as well as CPLR 205(a), and the doctrine of "equitable tolling"), he made no reference whatever to the Supremacy Clause, or to the U.S. Constitution generally, in either the trial court or the Appellate Division. The first time he ever mentioned the U.S. Constitution was when he purported to file an appeal as of right to the New York Court of Appeals pursuant to CPLR 5601(b)(1), which authorizes such an appeal if the order in question "directly involved the construction of the constitution of the state or of the United States." The Court of Appeals dismissed that appeal *sua sponte* because no such constitutional issue was involved. (A12-13).

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2. The parties vigorously litigated whether the tolling periods provided by 28 U.S.C. § 1367(d) and CPLR 205(a) ran from when the federal district court entered final judgment dismissing all claims against Squadron Ellenoff on November 16, 1998, or from when plaintiffs voluntarily withdrew their appeal to the Second Circuit from that judgment on March 9, 1999. Gold now accepts the New York courts' determination (A7) that the earlier date controlled. *See* Pet. at 6-7.

REASONS FOR DENYING THE PETITION

The petition rests entirely on the false assertion that "the state courts refused to apply the tolling provision of 28 U.S.C. § 1367(d) in derogation of the state courts' duty under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2 to enforce federal law." (Pet. at 8). To the contrary, the New York courts simply determined that 28 U.S.C. § 1367(d) was inapplicable because, by its terms, it applies only "unless State law provides for a longer tolling period." New York law, as embodied in CPLR 205(a), provides a tolling period six times greater than the one offered by 28 U.S.C. § 1367(d), rendering the federal statute irrelevant.

The trial court's opinion, adopted wholesale by the Appellate Division, explained:

> Clearly, CPLR 205(a), which stops the limitations clock for the period of pendency [of the prior federal action] plus six months rather than 30 days, provides a longer tolling period. Thus state law controls and plaintiff must comply with the provisions of CPLR 205(a) to get the benefit of the toll under the federal statute as well.

(A8). This interpretation is shared by Professor Siegel, a respected commentator on both New York's Civil Practice Law and Rules and 28 U.S.C. § 1367. Professor Siegel observes that CPLR 205(a) is "some six times more generous a gift than the federal statute's 30 days" and § 1367(d) therefore "defers to it." David D. Siegel, *New York Practice* § 614, at 1047 (3d ed. 1999). *Accord* David D. Siegel, *Commentary: The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction*, 28 U.S.C.A. § 1367, at 829,

837 (West 1993). Our research has not revealed a single instance where a New York court has applied 28 U.S.C. § 1367(d). Gold has cited none. In fact, Gold does not even cite CPLR 205(a) in his petition, let alone address the consensus that it supplants 28 U.S.C. § 1367(d) in New York.

Gold also fails to disclose the actual ground on which his state court action was dismissed. While he filed that action on February 5, 1999, within the six-month window provided by CPLR 205(a), he failed to comply with the statute's additional requirement "that service upon defendant [be] effected within such six-month period." Instead, for reasons he has never explained, Gold delayed service until May 27, 1999, well past the six-month deadline. (A7-8). Indeed, his service even on that date occurred on the 120th day after the suit was filed, which would have been the final day to effect service if the general service rule, CPLR 306-b, rather than CPLR 205(a), had controlled.

In enacting CPLR 205(a), the New York Legislature sensibly determined that, when a plaintiff whose prior suit has been dismissed wishes to re-file his claims, he must do so within six months and *serve* the defendant within the same six-month period. That rule accords with the purpose of limitations periods, to allow parties repose when a reasonable period of time has passed without receiving word of a lawsuit. The rule also recognizes that there is no excuse for delaying service upon a party who previously defended related claims in a prior suit. Nothing in 28 U.S.C. § 1367(d), or any other federal statute, limits the power of the states to establish rules governing when service must be made to pursue proceedings in their courts.

In fact, 28 U.S.C. § 1367(d) is completely silent as to when service of a subsequent suit must be made, thus necessarily leaving this matter to state law. Gold's argument boils down to the odd contention that the New York courts should have ignored the service requirement of CPLR 205(a) and applied instead the very different service requirement prescribed by CPLR 306-b, which pertains only to claims asserted in the first instance rather than to those re-filed following their prior dismissal. But that would have been clearly erroneous, and the New York courts' decision to apply one service rule as opposed to another was, in any event, purely a matter of state law, not an appropriate subject for certiorari.

Nor would Gold's action have been timely even if 28 U.S.C. § 1367(d) had been applicable. His state law claims in federal court were finally dismissed by the district court on November 16, 1998, and those claims were not re-filed in state court until February 5, 1999, twenty-one days beyond the 30-day period provided by the federal statute. To evade this problem, Gold contends that § 1367(d) tolls the running of the statute of limitations during the pendency of the prior case in such a way that whatever time still remained under the applicable statute of limitations when that case was filed is *added* to the 30-day period prescribed by § 1367(d). (Pet. at 6-7). Gold misconstrues § 1367(d).

In *Chardon v. Soto*, 462 U.S. 650 (1983), this Court observed that tolling can take a variety of forms:

> "Tolling effect" refers to the method of calculating the amount of time available to file suit after tolling has ended. The statute of limitations might merely be suspended; if so, the plaintiff must file

> within the amount of time left in the limitations period. If the limitations period is renewed, then the plaintiff has the benefit of a new period as long as the original. It is also possible to establish a fixed period such as six months or one year during which the plaintiff may file suit, without regard to the length of the original limitations period or the amount of time left when tolling began.

Id. at 652 n.1. The thirty days provided by 28 U.S.C. § 1367(d) falls into the last of these categories; it is a "fixed period . . . during which the plaintiff may file suit." *See, e.g., McInnis-Misenor v. Maine Medical Center*, 211 F. Supp. 2d 256, 263 (D. Maine 2002) (warning that plaintiffs "will be obliged by statute-of-limitations concerns to re-file their state-law claims immediately in state court" pursuant to § 1367(d), even though federal claim was brought shortly after events at issue); *Kolani v. Gluska*, 75 Cal. Rptr. 2d 257 (Cal. Ct. App. 1998) ("[Thirty] days is ample time for a diligent plaintiff to refile his claims and keep them alive. . . . Section 1367 subdivision (d) does not allow plaintiffs to 'tack' onto the limitations period the full time during which the federal action was pending.").

Allowing a plaintiff thirty days to re-file previously dismissed state law claims fully serves § 1367(d)'s purpose of ensuring that federal courts can dismiss pendent state law claims without prejudice while preserving the plaintiff's opportunity to pursue those claims in state court. Gold's interpretation of § 1367(d) tolling, by contrast, would lead to absurd results, well illustrated here. Under Gold's "suspense" theory of tolling, he would have had nearly five and a half years from the date his federal action was dismissed

to file his state court action against Squadron Ellenoff, thereby allowing claims allegedly accruing in 1992 to be asserted in 2004. (Pet. at 6-7). That would make a mockery of limitations periods, and utterly deprive defendants of the repose to which they are entitled.

At bottom, therefore, no basis exists for Gold's attempt to elevate his disagreement with the New York courts' interpretation of its service requirements into an issue of constitutional dimension. Gold failed to raise any purported constitutional issue either in the trial court or in the Appellate Division, where it was required to be raised to be preserved at all. *See* Robert L. Stern et al., *Supreme Court Practice* § 3.16, at 168-69 (8th ed. 2002) (citing cases) ("It is essential to the jurisdiction of the Supreme Court under [28 U.S.C.] § 1257(a) that a substantial federal question has been properly raised in the state court proceedings."); *id.* § 3.18, at 177 ("Generally, the litigant must follow the state procedures in raising the federal question."); *Melahn v. Hearn*, 459 N.E.2d 156, 157 (N.Y. 1983) ("Since th[e] constitutional issue was not raised below, it is not preserved for our review"). Equally important, the U.S. Constitution is in no way implicated by a state court's enforcement of its own procedures for when a summons must be served.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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